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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 242

WILEY H. CADDEL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

J. HOWARD SULLIVAN,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner above named respectfully petitions the Supreme Court to grant a Writ of Certiorari in the above entitled matter after a decision by the Supreme Court of the State of California which denied petitioner's petition for a Writ of Error Coram Nobis. The decision was filed on May 17, 1951, being a memorandum decision with no opinion filed.

The specific grounds upon which this petition for certiorari is based can be more graphically stated following a summary of the essential facts. It should be noted, however, that a hearing is necessary to secure uniformity of decision in California to settle important questions of law.

Statement of the Case

That petitioner, Wiley H. Caddel, was one of the defendants in the above entitled action; that on December 3, 1948 he was convicted by a jury on the five counts contained in the indictment; that the first count of the indictment charged conspiracy to violate Sections 67 and 68 of the Penal Code, being a conspiracy to give and offer bribes to executive officers of the State of California and a conspiracy to ask for and agree to receive bribes as executive officers and employees of the State; that the second count of the indictment charged conspiracy to violate Section 380a of the Penal Code, being conspiracy to have control either as owner, agent, employee or otherwise of slot machines; that count three charged the petitioner with having given a bribe to Sheriff B. G. Broaddus of Mendocino County on April 30, 1948; that count four charged petitioner with having given a bribe to Sheriff Broaddus on June 3, 1948; that count five charged petitioner with having given a bribe to Sheriff Broaddus' deputy, William White, on June 3, 1948.

That petitioner was sentenced on all five counts for the term prescribed by law on each of the five counts providing that the terms of count one and five should run concurrently, that the terms of count three and four should also run concurrently but should commence at the termination of the term of imprisonment imposed under counts one and five, and that the term imposed under count two should commence upon the termination of the term imposed under count three and four.

That petitioner duly made a motion for a new trial which was denied; that thereafter an appeal to the District Court of Appeal, Third Appellate District, was duly prosecuted and a decision thereon was rendered on June 10, 1950 by the Appellate Court and that thereafter a petition for re-hearing was duly made which re-hearing was denied except as to

modifying the decision heretofore rendered in one inconsequential aspect; which modification was rendered on June 24, 1950; thereafter petitioner was on June 10, 1950 denied a hearing by the Supreme Court of the State of California, Chief Justice Gibson and Justice Schauer dissenting from the denial of the petition for hearing.

That the opinion of the District Court of Appeal is reported in 98 A.C.A. 1, 219 P. 2d 519; that at no time prior to the motion for a new trial did the petitioner or his attorney come into the possession of the facts set forth in the affidavit of Paul McCarty, the original of which is attached to petitioner's petition filed with the District Court of Appeal, and states as follows:

"STATE OF CALIFORNIA,
County of Mendocino, ss:

Paul McCarty, being first duly sworn, deposes and says:

That he was indicted by the Grand Jury of Mendocino County in 1948 along with several other individuals among whom was one Wiley H. Caddel;

That the crimes for which he and the other defendants, including Mr. Caddel, were indicted were upon the charges of conspiring to give and solicit bribes to the Sheriff of Mendocino County and to the Attorney General of the State of California; that prior to the indictment, your affiant had been requested by the Sheriff of Mendocino County, one B. G. Broaddus, to ascertain from other individuals and in particular one Fred Grange, whether there was a conspiracy on foot to attempt to place illegal slot machines in various resorts in Mendocino County.

That as a result of this request, your affiant acted as an undercover agent for said Sheriff; and did report to said Sheriff various conversations that he had in respect to the alleged conspiracy;

That as a result of the investigations carried on by various law enforcement agencies in the County of Mendocino, your affiant was indicted as above set forth; that upon being indicted he thereafter questioned the Sheriff and the District Attorney of Mendocino County as to the reason for his indictment; that he raised this question of his indictment for the reason that there was no evidence of his guilt, rather, he had acted as above set forth only upon the request of the Sheriff;

That after his indictment and before the trial of the action, your affiant was informed by the District Attorney, James E. Busch and the Sheriff that he had nothing to worry about but rather, the case as against your affiant would be dismissed as there was not sufficient evidence to convict him but rather, as indicated, the only evidence relating to your affiant was that he had acted in consort with the Sheriff for investigative purposes; that your affiant informed the District Attorney that he believed that statement of the District Attorney and the Sheriff that the case as against your affiant would be dismissed but that he wanted further assurance thereof from the Crime Commission of the State of California; that as a result of this request for this further assurance, the District Attorney in Mendocino County, Mr. Busch, and your affiant, went to the offices of the attorney for the Crime Commission, one Mr. Warren Olney, in San Francisco at which time and place your affiant was introduced to Mr. Olney by Mr. Busch who stated that he had promised to dismiss the case as against Mr. McCarty and had told Mr. McCarty that he had nothing to worry about; that at this time and place Mr. Olney in the presence of Mr. Busch assured your affiant that the case as against him would be dismissed and that he need not worry about such dismissal being requested by the prosecution and granted for the reason that there was no evidence against your affiant;

That the case as against your affiant was dismissed by the trial court, being the Superior Court of the State of California in and for the County of Mendocino,

upon the request and motion made by the prosecution in the matter; that such motion to dismiss was not made until after such time that the Sheriff of Mendocino County had testified on behalf of the prosecution relative to proposed conversations he had had with your affiant regarding the identification of an individual who was one of the co-defendants in the action; that this testimony of the Sheriff was to the effect that your affiant had identified Wiley H. Caddel, one of the defendants, as being the individual who in effect stated that everything was fixed with the office of the Attorney General of the State of California so as to enable illegal slot machines to be operated in the County of Mendocino; that your affiant in his testimony flatly contradicted this proposed conversation between himself and the Sheriff; however, as set forth above in this affidavit, at the time of the Sheriff's testimony your affiant was still a defendant in the action and it was not until after the Sheriff's testimony that the prosecution moved to dismiss the case as against your affiant, which motion was promptly granted by the Court; that the reason for granting the motion was the lack of any evidence of any kind against your affiant; that the evidence introduced at the trial against your affiant was identical with the evidence introduced at the hearings before the Grand Jury of Mendocino County for the reason that the only evidence, as set forth herein, was to the effect that your affiant acted for and on behalf of the Sheriff in attempting to ascertain whether there was a conspiracy to operate illegal slot machines in Mendocino County;

That your affiant told no one of these promises and representations that a dismissal would be granted as against your affiant until the 10th day of November, 1950, at which time your affiant disclosed all of the facts, representations and promises as set forth in this affidavit to J. Howard Sullivan, an attorney-at-law; that the disclosures and conversations had with Mr. Sullivan was in the City of Ukiah, Mendocino County in the offices of Burke and Rawles, attorneys at law; that

those present during the time of the disclosures to Mr. Sullivan were your affiant and Mr. Sullivan.

Dated this 31 day of Jan., 1951.

(S.) PAUL MCCARTY.

Subscribed and sworn to before me this 31 day of January, 1951.

(S.) ETHEL HUMPHREY,
Notary Public in and for the
County of Mendocino,
State of California.

My Commission Expires April 30, 1952."

That as a result of the facts set forth in the affidavit of Mr. McCarty, petitioner was denied a fair and just trial for the reason that testimony of Sheriff Broaddus was introduced at the trial and heard by the jury, which testimony as to the effect that Mr. McCarty had told Sheriff Broaddus that petitioner had a conversation with Mr. McCarty whereby petitioner was to receive and take $4.00 per week per slot machine as a bribe to the office of the Attorney General in return for which that office would not interfere with the illegal operations of the slot machines in Mendocino County; that this testimony of Sheriff Broaddus was highly prejudicial and had Mr. McCarty not been a defendant in the action, it would have been incompetent for the reason of it being hearsay; that had this conversation not been related there would have been no testimony upon which petitioner could have been convicted; that it is plain from the facts as now ascertained and contained in the affidavit of Paul McCarty, Mr. McCarty was indicted and remained in the case as a defendant for the sole purpose of eliciting the proposed conversation between himself and Sheriff Broaddus which conversation, as indicated, was testified to by Sheriff Broaddus; that Mr. McCarty was kept as a defendant for that purpose cannot be questioned in view of the facts as set forth in his affidavit.

That petitioner and his attorney exercised every possible means to ascertain the true facts before the trial, during the trial and before the time for the motion of the new trial, but neither petitioner nor his attorney by the exercise of the utmost diligence possible could uncover the facts as set forth in Mr. McCarty's affidavit; that these facts were first made known to petitioner through his present attorney, J. Howard Sullivan, following Mr. Sullivan's investigation which led to the uncovering of these facts on the 10th day of November 1950.

That petitioner was further prejudiced to the extent of not having a trial by a jury of his choice and selection for the reason that at one point during the trial the State and all of the defendants, including petitioner, except the defendant McCarty, accepted a jury and thereafter Mr. McCarty exercised a peremptory challenge excusing one juror; that when Mr. McCarty exercised this challenge, he thereby caused a new and different jury to be selected other than the one accepted by petitioner. Hence, petitioner was not in fact tried by a jury of his choice and selection for the reason that had Mr. McCarty's case been dismissed prior to trial, obviously Mr. McCarty could have no discretion in the matter of the selection of the jury that was to try petitioner.

That all of the facts in this petition, other than those contained in the affidavit of Paul McCarty, were set forth in the opinion of the District Court (98 A. C. A. 1, 219 P. 2d 519); that the only new facts which this Court is herewith confronted are those set forth in the affidavit of Mr. McCarty.

Which affidavit of Mr. McCarty is supported by the affidavit of Joseph A. Ball, attorney-at-law, the original of which is attached to petitioner's petition filed with the Dis-

trict Court, and who represented petitioner during the trial of this action, which affidavit states:

"STATE OF CALIFORNIA,
County of Los Angeles, ss:

Joseph A. Ball, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice before all courts of the State of California and that as such attorney at law he represented Mr. Wiley H. Caddel in the trial held on five counts charged in the indictment and sentenced thereon to the terms prescribed by law; that he has read the affidavit of Paul McCarty, and the facts related by Mr. McCarty in his affidavit were not made known to your affiant until after November 10, 1950 and were then ascertained by your affiant through J. Howard Sullivan, attorney-at-law, who had conducted an investigation which resulted in bringing to light the fact that Mr. McCarty had been promised immunity and promised that the case would be dismissed as against him, all as related in Mr. McCarty's affidavit.

That your affiant prior to the trial, during the trial and prior to the motion for a new trial, exercised every method and mode conceivable to him for the purpose of discovering and ascertaining all facts pertinent to the defense of Mr. Caddel, but that at no time until after November 10, 1950 was he informed of the facts as set forth in the affidavit of Mr. McCarty.

Dated this 19th day of February, 1951.

(S.) JOSEPH A. BALL.

Subscribed and sworn to before me this 19th day of February, 1951.

(S.) GLADYS GUEST,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 21, 1951."

Grounds of Petition

In the case of *People* v. *Reid,* 195 Cal. 249, there is found a rather comprehensive statement of the function of the Writ of Error Coram Nobis and a succinct statement of the nature of the Writ. In that case the Court stated:

> "The office of the ordinary writ of error at common law was to remove the record of the case from an inferior to a superior court for the purpose of enabling the latter to review claimed errors of law appearing upon the face of the record. The principal office of the writ of error coram nobis was to enable the same court which had entered the judgment to reconsider it in a case in which the record still remained before the court. . . . The most comprehensive statement of the function and office of this writ which has come to our notice is the following from 5 Encyclopaedia of Pleading and Practice at page 29: 'The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists, or insanity, it seems at the time of the trial; or *a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.*' In addition to the scope of this writ as above stated, it would lie upon a judgment in the King's Bench for 'error in the process or through fault of the clerk.' This appears to refer to such cases as where the clerk had improvidently issued a writ of execution, upon a judgment which had been rendered but had not yet been entered. Or where an execution had been inadvertently issued and levied after the granting of a supersedeas and where a default had been inadvertently entered before the expiration

> of the time to plead or had been predicated upon a false return of service of process. . . . At the time this writ came into general use there was no remedy by appeal or by motion for a new trial, as these new remedies have come into existence by statutory enactment, they have supplanted this ancient writ as to so much of its former scope as is comprehended in and covered by the statutory remedies." (Emphasis ours.)

As may be seen from the statement found in the above quoted case where "a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have, prevented the rendition and entry of the judgment questioned", the judgment of the verdict of guilty as far as Mr. Caddel is concerned could not have been rendered, or if so rendered by the jury, would have been subject to reversal by the trial court for the reason that the only evidence against Mr. Caddel that connected him with the alleged conspiracy was the purported statement made by Paul McCarty to the Sheriff of Mendocino County, Mr. B. G. Broaddus.

As indicated in the opinion of the Appellate Court in the case of *People* v. *Griffin, Mulligan and Caddel,* at the time the Sheriff related the conversation from the witness stand, Mr. McCarty was still a defendant in the action; however, as set forth in the affidavit of Mr. McCarty in this petition, there was never any intention on the part of the District Attorney to prosecute Mr. McCarty, rather, he had been promised that the case against him would not so be prosecuted, but rather, it would be dismissed. Further, after a jury had been selected and agreed upon by all of the parties concerned, with the exception of Mr. McCarty, Mr. McCarty exercised a peremptory challenge

as against one of the agreed jurors thereby causing the petitioner, Mr. Caddel, to be tried by a jury not of his own selection. In touching upon this point, the Appellate Court stated in its opinion:

> "The next assignment of prejudicial misconduct on the part of the district attorney is based upon a charge that immunity had been promised in advance to defendants Paul McCarty and Robert Gray, and that by delaying dismissals as to these defendants, appellant Caddel was compelled to select a jury while they were being tried as co-defendants. This same contention has been considered, supra, in the appeal of William Mulligan. For the reasons heretofore given we hold the conduct of the district attorney not to have been prejudicial. The record does not support the claim that the prosecution intended to dismiss the charges against defendants Gray and McCarty before the jury was selected. Neither does it show that appellant Caddel was forced to accept a jury unsatisfactory to him because of the presence of the other two co-defendants."

As noted in the quoted portion of the Appellate Court's opinion, it is stated that "the record does not support the claim that the prosecution intended to dismiss the charges against defendants Gray and McCarty before the jury was selected". With this statement of the Appellate Court in mind, coupled with the facts set forth in Mr. McCarty's affidavit and the affidavit of Mr. Joseph A. Ball, the attorney who represented Mr. Caddel at the time of trial, and the petition of Mr. Caddel, it is apparent that there was no way possible for the record to indicate these facts at the time this appeal was considered. Such being the case, these facts must necessarily constitute facts which have only been ascertained since the time for the motion for the new trial in the matter had elapsed. Consequently, these facts must constitute a valid basis for the considera-

tion of the application of the remedy afforded by the Writ of Error Coram Nobis.

In regard to the dismissal of the case as against Mr. McCarty, the Appellate Court stated in its opinion in this matter:

> "The trial of the case commenced on November 8, 1948. During its course, and before the People had rested their case, the court granted motions of the district attorney to discharge defendants Gray and McCarty in order that each might be made a witness for the People, pursuant to the provisions of section 1099 of the Penal Code."

It is now apparent that the reason for the dismissal of the case against Mr. McCarty was not for the purpose of making him a witness for the People, but rather, was in furtherance of the promises and representations made to him by the District Attorney and the Sheriff. Hence it must follow, that the sole purpose of indicting and keeping Mr. McCarty in the case as a defendant for any period of time whatsoever was solely for the purpose of eliciting from the Sheriff a purported statement made by Mr. McCarty to the Sheriff, which statement would have been inadmissible as being hearsay if Mr. McCarty had not been a defendant in the action. While it is true that the trial court instructed the jury that the evidence related by Mr. McCarty was to be confined only as to himself not as to the other defendants, the damage done, it in this case amounted to the conviction of Mr. Caddel, cannot be cured by such instruction.

In the recent case of *Krulewitch* v. *United States,* 336 U.S. 440, 93 L. Ed. 790, Mr. Justice Jackson stated:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize pros-

ecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction. * * *"

Hence it is clearly evident that if Mr. McCarty had not been a defendant in this matter, no verdict of guilty could have been sustained as against Mr. Caddel for the reason that the only substantive evidence against him would have been mere association with the other alleged conspirators without any further evidence of actively or passively engaged in any acts whatsoever in furtherance of the designs or aims of the conspiracies. As pointed out in the case of *People* v. *Reid,* 195 Cal. 249, a Writ of Error Coram Nobis must issue when a valid defense exists from the facts

of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake, and these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.

In the case with which we are here concerned, the facts set forth in this petition must bring into operation the law laid down in *People* v. *Reid* so as to set aside the verdict and judgment in the matter and operate to release the petitioner from custody.

That there is presently no statutory remedy available to petitioner in that the judgment became final upon the denial of a hearing by the Supreme Court of the State of California, and that the facts as disclosed in this petition and affidavits are such that if they had been known prior to the trial or during the trial, a verdict of guilty could not have been rendered as against petitioner, and had they been known prior to the motion for a new trial, such motion would of necessity have had to have been granted by way of setting aside the verdict of the jury and finding petitioner not guilty.

WHEREFORE, petitioner prays that this Court grant a Writ of Certiorari in this matter to review the decision of the Supreme Court of the State of California.

Dated this 18 day of July, 1951.

WILEY H. CADDEL,
Petitioner.

Office-Supreme Court, U.
FILED
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CHARLES ELMORE CROPLEY
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No. 242

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1951

WILEY H. CADDEL,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. 242

SUPREME COURT OF THE UNITED STATES
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the Supreme Court of the State of California to review the order of said court denying without opinion the petition of Wiley H. Caddel for a writ of error *coram nobis.*

Petitioner Wiley H. Caddel, together with William Griffin, James Mulligan, Fred Grange, Paul McCarty and Robert Gray, was indicted in Mendocino County, California, on five felony counts. Count One charged

conspiracy to violate Sections 67* and 68* of the California Penal Code, a conspiracy to give and offer bribes to executive officers of the State and also a conspiracy to ask for and agree to receive bribes as executive officers and employees of the State. Count Two charged a conspiracy to violate Section 330a* of the California Penal Code, namely, to have under their control as owners, agents, employees, or otherwise, slot machines upon the result of the action of which money was then and thereafter to be hazarded. Count Three charged all defendants with having given a bribe to Sheriff B. G. Broaddus on April 30, 1948; Count Four charged all defendants with having given a bribe to Sheriff Broaddus on June 3, 1948; and Count Five charged all six defendants with having given a bribe to Sheriff Broaddus' deputy, William White, on June 3, 1948.

Prior to trial, defendant Grange entered a plea of guilty to Count One of the indictment and on motion of the district attorney, Counts Two, Three, Four and Five were dismissed as against him. During the course of the trial and prior to the time the people rested their case, the court granted the motions of the district attorney to discharge defendants Gray and McCarty in order that each might be made a witness for the people, pursuant to Section 1099* of the California Penal Code. On December 3, 1948, the jury returned its verdicts finding defendants Griffin, Mulligan and Caddel guilty on each of the five counts of

* See Appendix, for California Penal Code sections.

the indictment. Motions for probation and for a new trial were denied. On appeal the judgment of the trial court and the order denying a new trial were affirmed. (*People* v. *Griffin,* 98 Cal. App. 2d 1; 219 Pac. 2d 519.) A petition for rehearing was filed and the decision of the District Court of Appeal of the State of California, in and for the Third Appellate District, modified in a minor respect (*People* v. *Griffin,* 98 Cal. App. 2d 1, 57; 219 Pac. 2d 519). A petition for a hearing by the California Supreme Court was denied without opinion on July 30, 1950 (*People* v. *Griffin,* 98 Cal. App. 2d 1, 57). No writ of certiorari was sought from this court to review the decision of the District Court of Appeal of the State of California, in and for the Third Appellate District.

On April 4, 1951, Wiley H. Caddel filed a petition for writ of error *coram nobis* with the District Court of Appeal of the State of California, in and for the Third Appellate District. This petition was denied by said court without opinion on April 19, 1951 (see Minutes of the District Court, 103 A. C. A., Vol. 4, p. 2) and a petition for hearing was denied by the California Supreme Court on May 17, 1951 (see Minutes of the Supreme Court, 37 A. C. Vol. 7, p. 2).

Thereafter petitioner filed his petition for writ of certiorari with this court.

JURISDICTIONAL STATEMENT

(1) The petition for writ of certiorari should have been directed to the District Court of Appeal of the

State of California, in and for the Third Appellate District, which was given jurisdiction to decide the matter pursuant to the provisions of Section 1265 * of the Penal Code of the State of California and not to the California Supreme Court which did not assume jurisdiction of said cause. The order of the District Court of Appeal, in and for the Third Appellate District, was the final judgment of the highest state court in this matter.

Parker v. *Los Angeles,* 338 U. S. 327, 70 S. Ct. 171, 94 L. Ed. 144, 146;
Wissner v. *Wissner,* 70 S. Ct. 398, 338 U. S. 655, 94 L. Ed. 424, 427.

(2) The instant petition for writ of certiorari does not comply with the rules of this court (Rule 38(2) and Rule 12, par. 1), insofar as no federal question of substantial importance has been presented to this court nor were such questions presented to the state court.

Williams v. *Kaiser,* 323 U. S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398;
Klinger v. *Missouri,* 13 Wall. 257, 20 L. Ed. 635;
Whitney v. *California,* 274 U. S. 357, 360-1, 47 S. Ct. 641, 71 L. Ed. 1095;
Lynch ex rel Pierson v. *New York,* 293 U. S. 52, 54, 55 S. Ct. 16, 79 L. Ed. 191.

Petitioner, on page 1 of his petition for certiorari states: "* * * a hearing is necessary to secure uniformity of decision in California to settle important questions of law." This is not a ground for interven-

* See Appendix, for California Penal Code sections.

tion by the federal courts in a state matter nor does it present a federal question of substantial importance.

Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751;

Honeyman v. *Hanan*, 300 U. S. 14, 18, 57 S. Ct. 350, 81 L. Ed. 476.

STATEMENT OF FACTS

The sole record before this court is the petition for a hearing filed with the California Supreme Court after the denial of the petition for writ of error *coram nobis* by the District Court of Appeal of the State of California, in and for the Third Appellate District, and the answer to said petition filed by the respondent with the California Supreme Court. (Tr.† 1-25.)

The petition sets forth two affidavits containing evidence which it is alleged did not come into the possession of the petitioner until after the decision in his original matter had been affirmed on appeal. The contents of the affidavit of Paul McCarty are to the effect that prior to the indictment in the case of *People* v. *Griffin, et al.*, he had been requested by the sheriff of Mendocino County to ascertain whether there was a conspiracy to attempt to place illegal slot machines in various resorts in Mendocino County; that as a result of this request he acted as an undercover agent for said sheriff and reported various conversations with respect to the alleged conspiracy to the sheriff; that he, the affiant, was subsequently in-

† Tr. refers to Transcript of Record.

dicted and when he questioned the district attorney and sheriff of said county as to this indictment was given assurances of dismissal for lack of sufficient evidence; that he was also given an assurance of dismissal by the attorney for the Crime Commission of the State of California (Tr. 3-4). The affidavit further states that the action was dismissed as to affiant McCarty upon motion of the prosecution which was granted by the trial court but only after the sheriff of Mendocino County had testified on behalf of the prosecution relative to certain conversations with McCarty regarding the identification of one of the defendants; that affiant McCarty in his testimony at the trial contradicted this conversation between the sheriff and himself but at the time of the sheriff's testimony, the affiant was still a defendant in the case; that the affiant failed to tell anyone of the promises and representations made to him until November 10, 1950, when he disclosed this matter to one of petitioner's then attorneys (Tr. 4-5).

The affidavit of Joseph Ball, petitioner's attorney at the time of the original trial and appeal, was to the effect that the facts related in McCarty's affidavit were unknown to him prior to, during, or subsequent to the trial and prior to their disclosure to petitioner's then attorney on November 10, 1950, although he exercised all conceivable methods of ascertaining facts pertinent to Caddel's defense (Tr. 7).

The petition then contains the allegations that as a result of these facts petitioner was denied a fair

trial for the testimony of Sheriff Broaddus as to conversations had with affiant McCarty would have been incompetent if McCarty had not been a defendant and without this testimony petitioner would not have been convicted and further that after all defendants had accepted a jury, defendant McCarty exercised a peremptory challenge, thereby causing a different jury to be selected from the one accepted by petitioner Caddel (Tr. 6).

The answer to the petition filed by the respondent People raised the points that the facts as alleged in the petition did not bring the matter within the scope of a writ of *coram nobis* as delineated by the California courts and that the points presented were fully covered in the decision of the district court of appeal in *People* v. *Griffin,* 98 Cal. App. 2d 1; 219 Pac. 2d 519).

SUMMARY OF ARGUMENT

I. The Petition for Writ of Certiorari Is Not Directed to the Proper State Court Nor Does It Seek to Review a Final Judgment of a State Court.

II. A Writ of Certiorari Does Not Lie in the Instant Matter as the Decisions of the State Courts Were Based on Adequate Nonfederal Grounds and No Federal Question of Substantial Importance is Presented to this Court.

III. The Petition for Writ of Error *Coram Nobis* Filed in the State Court Did Not Present a Cause of Action for the Issuance of Said Writ.

ARGUMENT

I. The Petition for Writ of Certiorari Is Not Directed to the Proper State Court Nor Does It Seek to Review a Final Judgment of a State Court.

Petitioner filed his petition for writ of error *coram nobis* with the District Court of Appeal of the State of California, in and for the Third Appellate District (Tr. 1). This was the court that affirmed the judgment on appeal from the original conviction (*People* v. *Griffin*, 98 Cal. App. 2d 1; 219 Pac. 2d 519). Under the provisions of Section 1265 of the California Penal Code, any petition for writ of error *coram nobis* brought after a judgment has been affirmed on appeal and a hearing *not* granted by the California Supreme Court (which is the situation in this case, *People* v. *Griffin*, 98 Cal. App. 2d 1, 57; 219 Pac. 2d 219), must be made to the district court of appeal which affirmed the judgment on appeal.

In this matter the district court of appeal denied the petition for writ of error *coram nobis* (Tr. 1), and a petition for hearing was filed in the California Supreme Court. This review is discretionary with the California Supreme Court (Calif. Const., Art. VI, Sec. 4(b)). Where, as here, the California Supreme Court refused to exercise its discretionary power of review, the judgment of the District Court of Appeal, in and for the Third Appellate District, became final and was that of the highest state court. This is the final judgment which petitioner should have sought to review as the judgment of the highest state court,

instead he is seeking a review of the State Supreme Court's action in refusing to exercise its discretionary power.

Parker v. *Los Angeles,* 338 U. S. 327, 70 S. Ct. 171, 94 L. Ed. 144, 146;

Wissner v. *Wissner,* 338 U. S. 655, 70 S. Ct. 398, 94 L. Ed. 424, 427;

Robertson and Kirkham, Juris. of the Supreme Court of the United States by Wolfson & Kneeland (1951) pp. 90-91, Sec. 52;

Title 28, U. S. Code, Sec. 1257.

II. A Writ of Certiorari Does Not Lie in the Instant Matter as the Decisions of the State Courts Were Based on Adequate Nonfederal Grounds and No Federal Question of Substantial Importance Is Presented to This Court.

As appears from the record in this matter no federal question was sought to be raised in the trial of this matter, the appeal, or the *coram nobis* proceeding (Tr. 1-13; *People* v. *Griffin, et al.,* 98 Cal. App. 2d 1; 219 Pac. 2d 519).

It is a well-settled principle of law that before this court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause (*Honeyman* v. *Hanan,* 300 U. S. 14, 18; 57 S. Ct. 350; 81 L. Ed. 476; *Lynch* v. *New York,* 293 U. S. 52; 55 S. Ct. 16; 79 L. Ed. 191; *Williams* v. *Kaiser,* 323 U. S. 471, 477; 65 S. Ct. 363; 89 L. Ed. 398).

Under California law a writ of error *coram nobis* is a remedy of narrow scope. The California Supreme Court in the case of *People* v. *Adamson*, 34 Cal. 2d 320, 210 Pac. 2d 13, (cert. denied, 338 U. S. 897), has delineated the scope of the writ in this State in the following language: (34 Cal. 2d 320, 326-7, 330.)

> "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. (See *People* v. *Darcy* (1947), 79 Cal. App. 2d 683, 693 (180 P. 2d 752); *People* v. *Martinez* (1948), 88 Cal. App. 2d 767, 774 (199 P. 2d 375).) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court (*People* v. *Gilbert* (1944), 25 Cal. 2d 422, 442 (154 P. 2d 657); *In re Lindley* (1947) 29 Cal. 2d 709, 725-6 (177 P. 2d 918); *People* v. *Tuthill* (1948), 32 Cal. 2d 819, 821 (198 P. 2d 505).) The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (*People* v. *Shorts* (1948), 32 Cal. 2d 502, 513 (197 P. 2d 330).)
>
> "With the expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights.

Thus, the appropriate writ to secure relief from a judgment of conviction obtained by the use of false testimony known by the prosecution to be false is not *coram nobis* but habeas corpus (*In re Lindley, supra,* p. 725 of 29 Cal. 2d; see *People* v. *Mooney* (1918), 178 Cal. 525 (174 P. 325); *Mooney* v. *Holohan* (1934) 294 U. S. 103, 113 (55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406); *In re Mooney* (1937), 10 Cal. 2d 1 (73 P. 2d 554)), although *coram nobis* has been used for this purpose (see *People* v. *Kirk* (1946), 76 Cal. App. 2d 496, 498 (173 P. 2d 367)).

* * * * *

"'Where a defendant seeks to vacate a solemn judgment of conviction, particularly where such judgment has been affirmed on appeal, the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, but also the time and circumstances under which the facts were discovered, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.' (*People* v. *Shorts* (1948), *supra,* 32 Cal. 2d 502, 513.) * * *

"The proceeding designated '*coram nobis*' in this state is a court-made proceeding and, within the limits of the constitutional requirements pointed out in *People* v. *Shorts* (1948), *supra,* 32 Cal. 2d 502, 506, must, therefore, be subject to such limitations and procedural requirements as the creating

court may prescribe. Such proceeding is not subject to all the rules applicable to an original trial; it is an attack upon a judgment which has become final and in favor of which there are strong presumptions of regularity; the 'petition' is regarded as a motion to vacate the judgment; it is not a complaint nor does it initiate an independent action (*In re Paiva* (1948), 31 Cal. 2d 503, 509 (190 P. 2d 604)). * * *

"In the circumstances of the present case—a *coram nobis* attack upon a judgment which has become final after affirmance on appeal—we hold that this court, like the trial court, has 'every right and the plain duty to scrutinize (defendant's claims) with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in (the trial).' (*Hysler* v. *Florida* (1941), 315 U. S. 411, 417 (62 S. Ct. 688, 86 L. Ed. 932).) This rule is the same whether the proceeding be before us on appeal or on direct application. (See Pen. Code, §1265.) The Hysler case concerns the Florida procedure whereby convicted defendants can, even after affirmance of the judgment on appeal, obtain relief of the sort sought here; i.e., 'the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process' (p. 415 of 315 U. S.). 'The State's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the state Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction' (p. 422 of 315 U. S.). And in giving such consideration we, like the trial court, are 'not bound to accept at

face value the allegations of the petition' (*Taylor* v. *Alabama* (1948), 335 U. S. 252, 262 (68 S. Ct. 1415, 92 L. Ed. 1935))."

To the same effect, see:

In re Sprague, 37 A. C. 112, 230 P. 2d 633;
People v. *Thompson,* 94 Cal. App. 2d 578, 211 P. 2d;
People v. *Bellew,* 100 Cal. App. 2d 761, 224 P. 2d 845;
People v. *Kirk,* 98 Cal. App. 2d 687, 220 P. 2d 976;
People v. *Hoffman,* 103 A. C. A. 380, 229 P. 2d 486;
People v. *Emery,* 99 Cal. App. 2d 173; 221 P. 2d 223;
People v. *Tuthill,* 32 Cal. 2d 819; 198 P. 2d 505.

Thus, where as in the instant case, the decision of the state court could have been on the ground that the allegations of the petition did not meet the requirements of the California case law as to the scope of *coram nobis*, that there was not due diligence shown in the matter, or that the denial of said petition by the District Court of Appeal of the State of California, in and for the Third Appellate District, did not create a conflict in decisions in the State of California or present an important question of public law justifying a hearing by the California Supreme Court, it is apparent the state grounds are sufficient to sustain the judgment and, therefore, this court should not undertake to review such action.

Klinger v. *Missouri,* 13 Wall. 257, 263, 20 L. Ed. 635;

Wood Mowing and Reaping Machine Co. v. *Skinner,* 139 U. S. 293, 297, 35 L. Ed. 193, 11 S. Ct. 528;

Allen v. *Arguimbau,* 198 U. S. 149, 154-5, 49 L. Ed. 990, 25 S. Ct. 622.

III. The Petition for Writ of Error Coram Nobis Filed in the State Court Did Not Present a Cause of Action for the Issuance of Said Writ.

Petitioner contended both in this court and in the state courts that the testimony of Sheriff Broaddus to the effect that affiant McCarty had told Broaddus that Caddel was to receive $4 per slot machine as a bribe to the office of the Attorney General, in return for which that office would not interfere with the illegal operation of slot machines in Mendocino County, was highly prejudicial and would have been inadmissible if McCarty had not been a defendant in the case; and that had not this testimony been related there would have been no testimony upon which petitioner could have been convicted. (Petition for Certiorari, p. 6.)

That such a contention was without merit and was previously presented to the District Court of Appeal on the appeal from the original judgment appears from the opinion in *People* v. *Griffin,* 98 Cal. App. 2d 1, 51-2; 219 P. 2d 519, wherein it is stated:

> "It is urged first that the district attorney was guilty of prejudicial misconduct in offering in evidence certain testimony of Sheriff Broaddus relating to a conversation with McCarty. The substance of this conversation was that McCarty had advised

the sheriff that on the same day that appellant Caddel had made the visit to the sheriff's office a man had also called upon McCarty. This man represented that he had been to see the sheriff, and then stated to McCarty that he (the man) wanted $4 per week per machine for the attorney general's office. When McCarty gave the sheriff this information the two then compared notes and developed a similarity in stature and dress between Caddel and the man. This testimony was admitted in evidence prior to the dismissal of the case as to McCarty and therefore while he was still a defendant. In relation to it the trial court instructed the jury as follows: 'Ladies and gentlemen of the jury, in order that there may be no misunderstanding about the situation and that you may be fully advised and informed, Mr. Broaddus, who is now a witness on the stand, has among other things testified to certain conversations had between him and defendant McCarty, and I instruct you now that the testimony concerning such conversations with McCarty are admitted only as against the defendant McCarty and are not to be considered by you as binding upon any other of the defendants.'

"At a subsequent time in the trial, and after the court had granted the prosecution's request for discharge as to McCarty, so that he might be made a witness for the People, the court, upon motion of the defendants, struck out of evidence the conversations between Sheriff Broaddus and McCarty, as follows: 'Well, the motion will be granted and all testimony given by the witness Sheriff Broaddus relative to all conversations between him and Paul McCarty will be stricken, and the jury is instructed

to disregard all the testimony that has by order of the court been stricken or which hereafter may be stricken.'

"When McCarty was sworn as a witness he was questioned upon direct examination, without objection, as to the identity of the man with whom he had the conversation, as reported to Sheriff Broaddus. McCarty testified definitely that 'the man' was not appellant Caddel.

"A review of these circumstances induces the conclusion that the evidence in the first instance was properly admissible as against defendant McCarty. The court so limited it by a proper instruction as to the jury, and then subsequently struck the testimony of the conversation from the record. Evidence was then adduced from the one person who would know, namely, McCarty, that 'the man' was not Caddel. We cannot perceive that prejudice resulted therefrom to appellant Caddel."

Since the evidence of which petitioner now complains, even when admitted was restricted solely to defendant McCarty and before the close of the case had been stricken from the record and the jury so admonished, it could not have been highly prejudicial to the petitioner Caddel. A review of the evidence adduced at the trial of this matter (*People* v. *Griffin*, 298 Cal. App. 2d 1; 219 P. 2d 519), and of which the state court could and did take cognizance (*Hysler* v. *Florida*, 315 U. S. 411, 417, 62 S. Ct. 688; 86 L. Ed. 932), disclosed that the evidence adduced from McCarty or from Sheriff Broaddus was not the sole evidence upon which petitioner Caddel was convicted.

The record on appeal in this matter was voluminous, the Reporter's Transcript alone containing 4,127 pages. There were 53 witnesses called and examined and over 100 exhibits admitted into evidence (*People* v. *Griffin*, 98 Cal. App. 2d 1, 9, 219 P. 2d 519).

The evidence was fully considered by the District Court of Appeal in its opinion affirming the original conviction and it found there was substantial evidence beyond mere association connecting Caddel with the conspiracies charged and that he was participant therein (*People* v. *Griffin*, 98 Cal. App. 2d 1, 9-22).

Further, the question of admissibility of evidence is one of state law and not a federal question (*Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166). Even if McCarty had been promised immunity by the prosecution prior to the trial of the instant matter, which respondent does not concede, this fact would not have prevented rendition of the judgment of the trial court. There is no showing in the instant petition that the prosecution knowingly used any false testimony. On the contrary, as the original record on appeal demonstrates, McCarty when he took the stand positively testified that "the man" was not petitioner Caddel which point was again made clear on cross-examination. His affidavit included in this petition is not at variance with this testimony (Tr. 3-5).

It is a practice, which has been approved in most jurisdictions, if the ends of justice will thereby be served, to extend immunity to one jointly charged with crime, upon condition that he testify fully and

fairly as to his knowledge of the facts out of which the charge arose. No showing was made in the petition for writ of error *coram nobis* or in the petition before this court that such was not done.

It is thus apparent that the state court was correct in finding that if the facts alleged by the petitioner had been presented to the trial court a different judgment would *not* have resulted and therefore, *coram nobis* would not lie.

The decision in *Krulewitch* v. *United States,* 93 L. Ed. 623, 336 U. S. 440, is not in point, for that case merely holds that extra-judicial declarations of a co-conspirator were not admissible when made after the conspiracy was over.

With relation to petitioners' further contention that because McCarty was retained as a defendant and the action against him not dismissed prior to trial, petitioner Caddel was forced to accept a jury unsatisfactory to him, this point is without merit and clearly under the present facts not a ground for *coram nobis.*

The record of the original appeal discloses that at the time counsel for McCarty exercised the challenge complained of, petitioner Caddel had merely passed the challenge. Petitioner did not use any of his individual challenges until later and then participated in the *voir dire* examination of several prospective jurors as well as excusing three other jurors. Under California law, a defendant in a criminal case has no vested right to have certain specified jurors sit in the

trial of his case. Where, as here, it appears that the case was tried by 12 competent, fair, and qualified jurors and that the petitioner Caddel did not exhaust his peremptory challenges, he is in no position to complain (*People* v. *Patterson,* 58 Cal. App. 2d 837, 138 Pac. 2d 341; *People* v. *Harris,* 45 Cal. App. 547, 188 Pac. 65). Moreover, this point was considered by the District Court of Appeal in its decision on the appeal from the original judgment and held not to be prejudicial error (*People* v. *Griffin,* 98 Cal. App. 2d 1, 52, 54).

It thus appears that the facts as purported to be set forth in the petition for writ of error *coram nobis* did not establish errors of fact existing at the time of the trial, unknown to the trial court through no fault of the petitioner, which had they been known would have resulted in a different judgment or would have prevented the rendition of the challenged judgment. The state court found that upon a review of the record the petitioner was fairly tried and under the evidence justly convicted (*People* v. *Griffin,* 1, 57; 219 P. 2d 519). The California Supreme Court did not grant a hearing after this decision; therefore, this judgment became final. The District Court of Appeal in considering the application for *coram nobis* considered the record of the original appeal as well as the petition for writ of error *coram nobis* and reached the same conclusion. Petitioner did not establish that the decisions of other state courts were in conflict with the decision in the instant matter nor

that important questions of law were improperly decided.

It thus appears that where, as here, the petitioner has had other and adequate remedies, he had the adequate protection meant to be afforded to those accused of crime by both the State and the Federal Constitutions. Respondent submits that the state court was correct in denying the petition for writ of error *coram nobis* and the California Supreme Court in denying a hearing thereon as the writ of error *coram nobis* under California law serves a limited purpose and was not available under the factual situation presented here (*Hysler* v. *Florida*, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed. 932).

CONCLUSION

Upon the record and for the reasons stated respondent believes that the petitioner herein has not stated a federal question of substantial importance warranting this court in issuing the writ prayed for, nor has petitioner sought to review a final judgment of the highest state court. The petitioner received a very fair and impartial trial, the matter was thoroughly considered by the state courts on appeal and the petition for writ of error *coram nobis* did not present facts bringing said matter within the limited scope of the writ under California law. An examination of the entire record in the state courts demonstrates that the determination of the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due

process (*Lisenba* v. *California,* 314 U. S. 219, 86 L. Ed. 166).

It is therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied as the final judgment of the highest state court was not sought to be reviewed, no substantial federal questions were presented, petitioner did not comply with the rules of the Supreme Court, the action of the state court was based on adequate state grounds, and the petition for writ of error *coram nobis* did not present grounds for its issuance under the laws of the State of California and therefore was properly denied.

Respectfully submitted,

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APPENDIX

Penal Code, Section 67

Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state.

Penal Code, Section 68

Every executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State.

Penal Code, Section 330a

Every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building owned, leased or occupied by him, or under his management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable

thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building, owned, leased or occupied by him, or under his management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of such dice is dependent upon hazard or chance, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Penal Code, Section 1099

When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people.

Penal Code, Section 1265

After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted; provided, however, that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error coram nobis shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal.

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